THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Hon. Ralph K. Anderson III

Case No. 19-ALJ-04-0277-AP

Gregory Pencille, #312332, Appellant

V.

South Carolina Department of Corrections, Respondent

[INITIAL] BRIEF OF APPELLANT

Gregory Pencille, #312332
Evans CI F4A-275
610 Hwy 9 West
Bennettsville S.C. 29512
Appellant, Pro se

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3. Did the Administrative Law court err in dismissing Appellant`s Appeal **with** prejudice?
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STATEMENT OF THE CASE

In September of 2014, the senior chaplain (Cain) at Lee CI with the Warden (Reynolds) and the Program Director (Sligh) **approved** the Appellant for the Wiccan community use of Religious oils for use during Wiccan services to be given out to the Wiccan Community Coordinator (Pencille, Appellant). In November of 2018, Appellant in the capacity as Wiccan Coordinator was **denied (disapproved)** [by the Associate Warden (Tisdale) acting as the Warden] renewal of Religious oils for use in services.

On February 7, 2019, Appellant filed a step 1 grievance asserting "respond and approve religious oils for use in Wiccan Religious activities. And discontinue discriminating against Wiccan Community requests".*see *ACTIONS REQUESTED: on step 1 grievance*. The Warden denied the step 1 grievance. Appellant then filed a step 2 grievance on march 6, 2019, which was denied by the responsible official. On March 21, 2019, Appellant filed his notice to appeal asserting the department violated equal protection rights by denying wiccans use and allowing other religions use of (sacramental oil) and other religious needs, substantially and exceedingly burdened his right to practice religion by denying the use of religious oils. Appellant was transferred to another facility on June 6, 2019. The appellant filed a change of address notice on June 10, 2019, and the case was assigned on June 13, 2019. The record on appeal was filed on August 9, 2019. Appellant filed his brief on September 23, 2019 and added that transferring him to an institution where the Wiccan practice is almost non-existent and the chaplain is prejudiced against it had added an extra element of prejudice and so asked the court to allow it to be preserved for future litigation. On October 23, 2019, the department filed a motion to dismiss on the ground that there is no State-created liberty interest implicated by Appellant's allegations pursuant to *Slezak v. South Carolina Department of Corrections, 361 S.C. 331, 605 S.E.2d 508 (2004)*. On October 28, 2019, Appellant filed a Response to the Motion to Dismiss, arguing that "constitutional violations caused by the actions of a state agency are clearly state-created liberty interests."

By final order dated November 27, 2019, the court granted the motion to dismiss and dismissed Appellant's appeal with prejudice. On December 10, 2019, appellant filed a Response to order and Notice and Demand by Affidavit, which the Respondent never acknowledged or responded to. Appellant filed a response to the final Order on December 11, 2019, in which he argued that the Final Order was clerically incorrect, Appellant clarified his response was not to be construed as a motion to reconsider [as motion for reconsiderations are not allowed pursuant to *Rule 65 SCALCR*].

On December 31, 2019, Appellant filed a motion to stay, issuance of Writ of Supersedeas and Petition to Compel a Response (motion). The court of Appeals received notice of Appeal on December 27, 2019 and assigned a case no. on January 3, 2020. The court of Appeals denied motion to stay, issuance of writ of Supersedeas, and petition to compel a response and granted motion to proceed without payment on January 15, 2020. The Administrative court responded to the same motion for issuance of Writ of Supersedeas by order, filed on January 23, 2020.

FACTS

S.C. Code Ann § 24-27-500 Application of Religious Freedom Act to Prison Regulations, (B) A state or local correctional facility regulation may not be considered the "least restrictive means" of furthering a compelling state interest if a reasonable accommodation can be made to protect the safety or security of prisoners, correctional staff, or the public. 19 S.C. Jur. Const. Law§35.1

S.C. Code Ann §1-32-30.Purpose of Chapter. (1) Restore the compelling interest test as set forth in, Wisconsin v. Yoder, 406 U.S. 205 (1972) and Sherbert v. Verner, 374 U.S. 398 (1963) and to guarantee that a test of compelling state interest will be imposed on all state and local laws and ordinances in all cases in which the free exercise of religion is substantially burdened. (2) Provide a claim or defense to persons whose exercise of religion is substantially burdened by the state.

S.C. Code Ann §1-32-40, Restriction on State`s ability to Burden exercise of Religion.

S.C. Code Ann §1-32-50, Burden on exercise of religion claim or defense. If a person`s exercise of religion has been burdened in violation of this chapter, the person may assert this violation as a claim or defense in a judicial proceeding. Assertions, as a claim or defense in a judicial proceeding award- Attorney fees, and costs.

S.C. Code Ann §1-32-60, (B) Nothing in this chapter may be construed to burden any religious belief.

"The Religious Clause prohibits the government from favoring religion, but they provide no warrant for discriminating against religion." Board or Ed. Of Kirgas Joel Village school Dist. V. Gromet, 512 U.S. 687, 114 S.ct. 2481, 2498, 129 L.E.2d 546 (1994).

Religious accommodation in cases contain burden-shifting scheme analogous to that McDonnell Douglas: employee must first establish a prima facie case of religious discrimination, and the burden then shifts to employer to show that it could not reasonably accommodate employee`s religious needs without undue hardship Civil Rights Act of 1964§ 703(a)(1), 42 U.S.C.A -§2000e-2(a)(1). In the instant case the staff and administration at both Lee CI and Evans CI had been accommodating then due to neglect and personal bias chose to stop accommodating **only** the Wiccan Community`s Rights. EEOC. V. Firestone Fibers & Textiles Co, 515 F.3d 307, 312, (4th cir 2008)

Issue presented in Appellant's brief as to institutional transfer was an additional form of Punishment and religious depravity. Respondent took it out of context and argued incorrectly. Brown v. Evatt, 332 S.C. 189, 194, 470 S.E.2d 848, (1996) transfer within prison system or downgrading custody not subject to judicial review **as long as** prison officials **do not** act arbitrarily, capriciously, or from personal bias or prejudice.***see also** Al-Shabazz v. State, 338 S.C. 354,527 S.E.2d 742.(2000), Skipper v. SCDC370 S.C.267,633 S.E.2d 910(2006). Appellant was merely establishing for the record of a possible second grievance issue to be filed against the appellants receiving institution, where upon arrival appellant Pencille was immediately shown a religious discriminating atmosphere. Pencille wanted only to state for the record that although the two separate institutions were acting in like fashion against "Wiccans" it was still the same Agency acting accordingly.

The fact still remains the same, "I am still not allowed to practice my religion and / or use religious oil in my [non-existent] religious worship. The institutions policies' and practices infringe upon my ability to practice my religion at all. [ex. Policy states that no inmate can be deprived the opportunity to attend worship, but in the Wiccan policy handbook it is explained that worship in participatory and one attending must have completed a basic course in the study of the practice. If inmates attend who are not proficient in the practice of the worship [by religious beliefs] then the service is ineffective. Policy states that Wiccans will conduct their worship according to the cycle of the full or new moon schedule and yet the allowance at Evans CI has service scheduled every Monday, clearly not according to agency policy and clearly not allowing proper worship. Policy and the protection against discriminatory actions clearly are not effective if they are not enforced or properly understood. Where these protections may be written they become wholly inert if never applied or possibly misapplied to inmates religious practices. This effectively violates the rights of religious practice and when applied to one religion over another it becomes prejudicial. Because it is a result of actions personal and professional, biasness of the agencies employees towards an individual due to his religion it creates an as applied "state-created" liberty interest and violates equal protection when policy and practices substantially burdens one religion over another. This further violates due process when proper grievances are mismanaged and/ or ignored.

It also states that if studies or services are interrupted there must be an incident report filed by an officer as to the reasons for cancelling. This policy is rarely if ever followed. The inmate coordinator does fill out a comment section on the back of a sign in sheet in which appellant tried to always comment as to deficiencies of the agencies actions. Unfortunately the agency keeps the records in there possession and it is unknown as to how long they keep the records or their policy on retention of those records.

All these issues where and are properly preserved for the record by the appellant from the very first request stating the issues of the as applied civil rights, equal protection, and state-created liberty, property interest correctly and clearly addressed and the inaction of the agency and the lower courts is completely repugnant and is a miscarriage of justice which can be easily corrected by the court however the appellant is entirely powerless to remedy this situation. As

summary judgement affidavit would be inadmissible hearsay insufficient to create genuine issues of material fact... Notarization of unsworn letter was insufficient to require court to consider it...In Whittaker summary judgement was submitted as affidavit whereas in this case respondent did not swear or authenticate the document in any way to conform to court rules to allow it to be admissible as evidence the court could consider. Kennedy V. Joy Technologies, Inc. 269 Fed. Appx 302 (2008), District court abused its discretion, at summary judgement stage by improperly excluding evidence. The administrative court abused its discretion by improperly including evidence in allowing any and all "papers filed by respondent in this case. And, Lasher V. Day & Zimmerman Intern, Inc 516 F.Supp.2d 565 (2007), Hearsay evidence may not be considered on motion for summary judgement.

The routine prejudicial practices of this state's judicial system has created contemptable situations which are ignored as common place as if they were proper, resulting in the doling of miscarriages of justice a daily occurrence. An improper practice no matter how often it is overlooked is still no less improper.

Although reviewing court shall not substitute it`s judgement for that of the administrative law court as to findings of fact, reviewing court may reverse or modify decisions that are controlled by error of law are clearly erroneous in view of the **substantial evidence** on the record as a whole. Code 1976 §1-23-610(B). In determining whether the administrative law courts (ALC) decision is supported by **substantial evidence**, reviewing court need only find, considering the record as a whole, evidence from which reasonable minds could reach the same conclusion that ALC reached. ESA Services, LLC v. S.C. Dept. of Revenue, 392 S.C. 11, 77 S.E.2d 437 (2011). **"substantial evidence",** for the purpose of reviewing an agency`s decision under the Administrative Procedures Act (APA), is **relevant evidence** that, considering the record as a whole, a reasonable mind would accept to support the agency`s actions. code 1976 §1-23-380(A)(6). *see also Al-Shabazz v. State. In appellant`s case the situation is that the agency offered no evidence, gave no explanation or demonstration, and did not challenge any assertions made by appellant. To afford meaningful judicial review of ALC`s final decision on appeal from final decision of Dept. of Corrections in a non-collateral or administrative matter, the administrative law judge **must** adequately explain the decision by documenting the findings of fact and basing the decision on reliable, probative, and substantial evidence on the whole record. code §1-23-350. Since the respondent asserted there was no stated claim (when clearly there was) respondent attempted to circumvent statute as a whole when in fact the ALJ should not have abused his discretion and denied the respondent`s summary judgement.

The decision of the ALC should not be overturned on appeal **unless** it is unsupported by **substantial evidence** or controlled by some error of law. code §1-23-610(C)(2007), original Blue ribbon taxi corp. v. S.C. Department of motor vehicles, 340 S.C. 600, 670 S.E.2d 674. To warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and the prejudice: prejudice is a reasonable probability that the fact-finder`s determination was influenced by the challenged evidence or lack thereof. Hill v. S.C.

explained in the following arguments and in the appellants lower court filings in which need to be considered as record and evidence in these matters.

ARGUMENTS

1. **Did SCDC violate the religious rights, protection of liberty and property, equal protection and due process to the appellant and the Wiccan community protected by the U.S. Const. 1st, 14th amendments, 42 U.S.C.A. and SCDC policy P.S. 10.05**

Wolff v. McDonnell, 418 U.S. 539, 99 S.ct.2063, 41 L.Ed.2d 935 (1974). Requires minimal due process when for state-created liberty interests, which are not necessarily limited to sentence related credits and major disciplinary decisions. Sandlin v. Conner, 515 U.S. 472, S.ct. 2293, 132 L.E.2d 418 (1995) Due process is offended only when inmate is subject to atypical and significant hardships in relation to ordinary incidents of prison life. Due process guarantees judicial review of liberty interests. Whereas other religions are afforded more freedoms to practice their religions Wiccans have not and the requested remedy to this issue falling on deaf ears creates hardships to the practice of appellant's religion and the resulting treatment by the agencies administration and staff is atypical considered to other religions practices.

Al-Shabazz v. State, 338 S.C. 354,527 S.E.2d 742.(2000) An inmate may seek judicial review of the DOC final decision in an administrative matter under the provisions for contested cases contained in the (APA) admin. Proc. Act. Code 1976 §§1-23-10 to 1-23-160, 1-23-310 to 1-23-400,1-23-500 to 1-23-600.

A "contested case", for the purposes of the provision of the Missouri Administrative Act (MAPA) that defines, "agency" as an administrative officer or body authorized to make rules or to adjudicate (contested cases, is a proceeding before an agency I n which legal rights, duties, privileges of a specific parties are required by law to be determined after hearing.) (Contested cases). Krentz v. Robertson, 228 F3d. 897 (2000). The appellant requested assistance by court rules and according to Al-Shabazz v. State should have been afforded that assistance to overcome the legal bias from the state agencies filings which in themselves where not proper before the court.

The accusation of "conclusory" statements is a pale attempt to exclude arguments. The appellants history of the case included the discriminatory actions and issues the department perpetrated against the appellant and his faiths community as well as an inclusive list of cases to which the agency and the administrative court should have followed precedent and fixed the problem of discrimination instead of continued

prejudice and biasness towards a recognized faith. Schmidt V. Courtney 357 S.C. 310, 592 S.E2d 326 (2003), alleging negligent design- affidavit revealed high level of specificity of facts (reversed and remanded). Affidavit was attorney written, in appellants case affidavits and all other documents were drafted by Pro Se litigant (himself) and still surpasses the inadmissible submissions by respondent's professional legal counsel.

Slezak v. SCDC, 361 S.C. 331, 605 SE.2d. 508 (2004) in Slezak case it is determined that educational tapes **not** Religious tapes were not considered state-created liberty interest. Where Religious oils may be restricted by the Warden of an institution the Warden does not have the decision to deny one religion use of oil and yet allow another and may not deny without stating concisely the reasons it is being denied. As in Nance v. Miser 700Fed appx. 629 (9th cir 2017), prison officials failed to demonstrate that prison security would have been substantially burdened by prisoners use of scented oils. The agency refuses to give any explanation let alone demonstrate any burdens. The court should have called on this process of demonstrations from the beginning and still has not required the agency to do so.

Review of appellant's brief to the administrative law court has further inclusive cases which are not cited due to space constraints but are still pertinent to this case and question 1. of this argument and should be preserved of review on appeal.

2. Did the Administrative court err in granting Respondents summary Judgement without any admissible evidence?

Upon review of any of the agency's submitted papers to the administrative law court, none of them follow the SCRAP or SCRCP to be considered as admissible as evidence before any court. Notably rule **240** (g)SCRAP **failure to comply.** Failure of the moving party to perform any act required by this rule may be deemed abandonment of the motion or petition. And rule 7 (b)(2) and **10** (e)SCRCP. All of respondent's motions/ petitions are "unsworn" and "unauthenticated by affidavit". Thusly the judges granting was based on inadmissible evidence and is bias. 28 U.S.C.A..

Humphery's & Partners Architects, LP v. Lessard Design, Inc 790 F3d 532 (2015), subsequent verification or reaffirmation of an **unsworn** report, either by affidavit or deposition, allows the court to consider the **unsworn** report on a ruling for motion for summary judgement. No subsequent or reaffirmation was made by the agency even after appellant's voicing concern as to the admissibility of respondent's filings. B&J Enterprises, LTD v. Giordano 329 Fed. Appx. 411 (2009), letters containing statements and opinions concerning owner and business reputation were **inadmissible** on summary judgement, where letters were **unsworn and unauthenticated by affidavit**. Whittaker v. Morgan State University 524 Fed. Appx. 58 (2013), content of **unsworn** letter by student attached to

Department of Health and environmental control, 389 S.C. 1, 698 S.E.2d 612. There is no evidence entered by the respondent that would substantiate any defense or that would conclude that summary judgement was warranted. The ruling was clearly an error of law because of all the previous and presently stated reasoning, and the prejudice is obvious, the appellant was and is being denied his protected right to practice his religious beliefs and is not being afforded equal protection of the law by the courts adverse ruling. S.C.D.C is without standing. A party must be a real party in interest to the litigation to have standing. A "real party in interest" for the purposes of standing is a party with a real, material, or substantial interest in the outcome of the litigation. S.C.D.C does not care how this litigation ends therefore cannot cognize any "real" defense in this matter other than to accuse the appellant of failure to state a claim, which is absurd on its face.

3. Did the Administrative Law court err in dismissing Appellant's Appeal with prejudice?

Court of Appeals reviews grant of motion to dismiss for failure to state a claim, de novo. Trejo v. Hospitality Property, Inc 795 F3d. 442 (2015) the same standard as the circuit court, Benedict college v. National credit systems, Inc. 400 S.C. 538 (2012).

The Administrative court dismissed appellants appeal with prejudice. Dismissal of a complaint "with prejudice" is intended to bar relitigation of the same claim. Spence v. Spence, 368 S.C. 106 (2006). When a complaint is dismissed for failure to state facts sufficient to constitute a cause of action, the dismissal is generally "without" prejudice: the plaintiff in most cases should be given an opportunity to file and serve an amended complaint. Rules civ. Proc. Rule 12 (b)(6).

Courts **do not** have decision to dismiss a complaint "with" prejudice for failure to state a claim without at least considering whether to allow leave to amend. Skydive myrtle Beach, Inc v. Horry County 426 S.C. 175, 826 S.E.2d 585.**abrogating,** Parodis v. Charleston Cty. School dist. 819 S.E2d 147

Forrester v. Smith & Steele Biulder's, Inc 295 S.C. 504, 507, 369 S.E2d 156, 158 (Ct. app 1988). (Stating "a proper reason" to deny a motion to amend could be "bad faith", undue delay, or prejudice)- in the absence of a proper reason...a denial of leave to amend is an abuse of discretion.) **Reverse** on grounds of opportunity to amend complaint under Rule 15(a)

- When a court finds a complaint fails to state facts sufficient to constitute a cause of action, Court should give the plaintiff an opportunity to amend the complaint before filing final order of dismissal. SCRcivP- 12(b)(6), 15(a)
- Sufficiency of a pleading stating a claim, not the merits.
- Vacating or setting aside dismissal.

In this case the court dismissed "with" prejudice and upon appellants request for amended filing ignored several attempts until appellant filed writ of supersedes in which the respondent returned a "conclusory" reasoning in which is just the same as failing to state a cause of action, which appellant clearly has.

4. Did the administrative court err in not allowing an oral argument to further the record?

Where appellant requested an oral argument the administrative court did not respond. Where issues raised in proceedings for declaratory judgement are legal and not equitable in nature, They must be tried at law if either party insists upon it, and right of jury trial in what is essentially an action at law may not be denied merely because adversary asked that controversy be determined under declaratory procedure. Code 1952 § 10-2001,10-2009.

Appellant requested guidance from the court in that to remedy prejudice in this case oral argument may be appropriate to further the evidence on the record due to respondents inadmissible filings and the resulting prejudice from the courts actions and inactions.

CONCLUSION

Appellant prays this court considers issues raised in appellant's filings in the lower court as well as in this brief as appellant properly requested this court grant motion to be heard on the original record without reproducing any part. Appellant is indigent and was granted motion to proceed without payment which this court should have granted motion to be heard on the original record.

Appellant prays this court upon review of the admissible evidence sees it proper to grant appellants brief returning this case to the lower court for further "oral arguments" to expand the record to properly review the record as a whole or simply rule in favor of appellant by granting

default judgment against respondent. Appellant only wishes that justice prevail in allowing appellant to practice his religion even at the barest sense. As to this point the department still discriminates against the Wiccan faith and does not follow any agency policy or constitutional law protecting the practice of religion. Presently not allowing Wiccans to study, worship, or use religious food, equipment, or religious oils and gives no reason other than security in which the agency **must** demonstrate (which they **cannot**) that it burdens the agencies normal operations.

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Date: May 7th, 2020

SWORN to and subscribed before me this 7th
Day of May 2020
(L.S.)
Notary Public
My Commission Expires: 2/17/24

Certificate of service

I hereby certify that the undersigned on the 5th day of May, 2020. In Bennettsville, South Carolina served a copy of Brief of appellant, designation of matter to be included in the record on appeal on all parties by depositing the same in the U.S. mail, postage paid or in the intuitions mailroom and addressed as follows:

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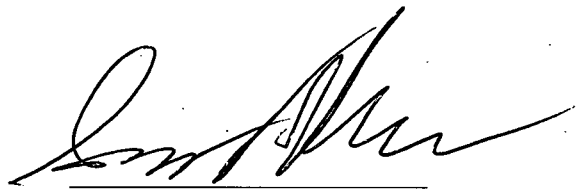

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Date: May 5th ,2020

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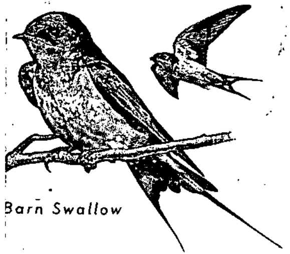

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